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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MATHEW RUBEN MANZANO, Defendant and Appellant.	D058661 (Super. Ct. No. FSB049630)
In re MATHEW RUBEN MANZANO on Habeas Corpus.	D060795

APPEAL from a judgment of the Superior Court of San Bernardino County, Michael A. Smith, Judge. (Retired judge of the San Bernardino Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

ORIGINAL PROCEEDING in habeas corpus. Petition denied.

By this appeal and consolidated proceeding for writ of habeas corpus, Mathew Ruben Manzano challenges the judgment sentencing him to prison after a jury found him

guilty of the first degree murder of Raymond Holguin, Jr., and the second degree murder of Fernando Gurule. In both the appeal and the habeas corpus proceeding, Manzano contends his trial counsel was ineffective for failing to correct and failing to assign as misconduct certain factual misrepresentations made by the prosecutor during the guilt phase closing argument. In the appeal, Manzano additionally contends the prosecutor unconstitutionally used peremptory challenges to prevent Hispanic men from sitting on the jury; trial of the guilt phase by a death-qualified jury violated his constitutional rights; the court erroneously sentenced him to life in prison without the possibility of parole (LWOP) for the second degree murder of Gurule; and the cumulative effect of trial errors unconstitutionally deprived him of a fair trial.

We agree the court imposed an unauthorized prison term of LWOP for the second degree murder of Gurule and modify the judgment to impose the correct prison term of 15 years to life. We reject Manzano's other arguments, affirm the judgment as modified, and deny the petition for writ of habeas corpus.

I

FACTUAL BACKGROUND

A. *The Murders*

On March 19, 2005, at approximately 11:00 p.m., a masked man later identified as Manzano (see pt. I.C., *post*) entered a house and shot and killed Gurule and Holguin. Holguin's two-day-old son was also shot in the feet.

Immediately after the shootings, Holguin's girlfriend, who was lying on the floor during the shootings, heard Manzano ask, "What's up now, fool?" Manzano then left the house, making a sound as if he were dragging his foot.

A neighbor saw Manzano as he exited the house and headed toward the street. Manzano limped toward a second man (later identified as Eric Estrada) and said he thought he had been stabbed and they "need[ed] to leave now." Manzano and Estrada got into a nearby car and sped away.

B. *The Initial Investigation*

In response to a telephone call from the victims' survivors, officers from the sheriff's department went to the murder scene and collected evidence. Several bullets and casings of two different calibers were found near the corpses. Two sets of footprints were found in a flowerbed near the driveway.

Meanwhile, a police officer was dispatched to a hospital where Manzano presented with a gunshot wound to his back. Manzano told the officer someone drove by and shot him while he was walking along a street. Manzano also said that after he was shot, two unknown men pulled up in another car and took him to the hospital. The officer went to the location where Manzano said he had been shot, but no one in the vicinity heard gunshots or saw Manzano; and the officer found no bullet casings, blood, broken glass or other physical evidence to corroborate Manzano's story.

A detective from the sheriff's department also spoke to Manzano at the hospital. The detective photographed the soles of Manzano's shoes, traveled to the murder scene to compare the photographs to the two sets of footprints found in the flowerbed, and

determined one set matched Manzano's shoes. When the detective returned to the hospital and asked Manzano where his shoes were, Manzano said his sister had taken them. Manzano's shoes were later examined and tested by a criminalist working for the sheriff's department, who determined the shoes could have left the footprints found in the flowerbed outside the house where Holguin and Gurule were murdered.

The detective also observed the surgical procedure during which a bullet was removed from Manzano's pelvis. The bullet was fired from the same gun that fired some of the bullets found at the murder scene.

C. *The Informant*

Ernesto Regalado met Manzano "out on the streets" in 2004 when they were both members of the Varrio Redlands criminal street gang. Manzano and Regalado were incarcerated at the same prison from late March to early July 2005, during which time Manzano told Regalado he had murdered Gurule and Holguin.

In June 2009, while Regalado was again in prison, he contacted the sheriff's department about the murders. According to Regalado, Manzano told him the following:

Manzano disliked Holguin because he had testified against Manzano in a carjacking case. A week before the murders, Manzano tagged Holguin's sidewalk with gang graffiti.

On the night of the murders, Manzano and Estrada saw Holguin with a woman at a liquor store. Estrada asked Manzano, "What are you going to do?" Manzano responded, "I'm not going to do nothing because there's a lady present." Estrada then said, "F**k

that shit. This is gang-banging." The two continued to argue, and Manzano eventually said, "I'll run up in that fool's house. . . . I'll show you, I'll show you what's up . . . ."

Later that night, Manzano and Estrada drove to Holguin's house, where Manzano shot Gurule and Holguin. While Manzano was shooting Holguin, Estrada fired shots at the couch on which Holguin lay. One of Estrada's shots hit Manzano in the back as he started to exit the house.

The following morning when Manzano was on the way to the hospital, he fabricated a story about his gunshot wound. According to Regalado, Manzano "was going to say he was walking down the street and got jacked by some niggers."

II

PROCEDURAL BACKGROUND

A. *The Charges*

After Regalado reported that Manzano had admitted shooting Gurule and Holguin, the People charged Manzano with the murders of Holguin (count 1) and Gurule (count 2) (Pen. Code, § 187, subd. (a))[1] and the attempted murder of Holguin's son (count 3) (§§ 187, subd. (a), 664).

The People alleged multiple special circumstance allegations in connection with the murder charges. As to counts 1 and 2, they alleged Manzano committed multiple murders and intentionally killed Holguin and Gurule while Manzano was an active member of a criminal street gang to further the activities of the gang. (§ 190.2,

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1 Undesignated section references are to the Penal Code.

subd. (a)(3), (22).) As to count 1, the People alleged Manzano intentionally killed Holguin in retaliation for testifying in a criminal proceeding. (§ 190.2, subd. (a)(10).) As to count 2, they alleged Manzano killed Gurule in the course of a kidnapping. (§ 190.2, subd. (a)(17)(B).)

As to all counts, the People alleged multiple firearm enhancement allegations. (§ 12022.53, subds. (b)-(d).)

Finally, as to count 3, the People alleged Manzano's attempted murder of Holguin's son was gang related. (§ 186.22, subd. (b)(1)(C).)

B. *The Verdicts and Sentence*

At the guilt phase, the jury found Manzano guilty of first degree murder on count 1 and second degree murder on count 2, but not guilty on count 3. The jury also found true all the special circumstance and firearm enhancement allegations attached to both murder counts.[2]

At the penalty phase, the People sought the death penalty. The jury, however, returned verdicts setting the punishment for each murder conviction as imprisonment for LWOP.

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2 The jury should not have addressed the special circumstance allegations as to count 2 after it reached a verdict of second degree murder on that count, because a conviction of "first degree murder is a prerequisite for a special circumstance finding." (*People v. Balinton* (1992) 9 Cal.App.4th 587, 590 (*Balinton*).) The jury's true findings on those allegations resulted in the unauthorized imposition of an LWOP prison term for Manzano's conviction on count 2. (See pt. III.D, *post*.)

Based on the jury's penalty phase verdicts, the court sentenced Manzano to two consecutive prison terms of LWOP. (§§ 190, subd. (a), 190.2, subd. (a).) For each conviction, the court also imposed a consecutive prison term of 25 years to life for the enhancement for personal and intentional discharge of a firearm causing death. (§ 12022.53, subd. (d).) The court imposed but stayed execution of the prison terms for the other firearm enhancements. (§§ 12022.53, subds. (b), (c), 654.) Manzano's aggregate prison sentence was therefore 50 years to life plus two consecutive terms of LWOP.

III

DISCUSSION

Manzano raises several claims of error, including the prosecutor's unconstitutional use of peremptory challenges, ineffective assistance of trial counsel, the trial court's unconstitutional death qualification of the jury before the guilt phase of trial, sentencing error and cumulative effect of errors. We shall consider these claims seriatim.

A. *The Trial Court Properly Denied Manzano's Motions Objecting to the Prosecutor's Use of Peremptory Challenges*

Manzano, who is Hispanic, contends the trial court erred in denying his motions objecting to the prosecutor's use of peremptory challenges (see Code Civ. Proc., §§ 225, subd. (b)(2), 226, subd. (b)) to prevent two Hispanic men from sitting on the jury. According to Manzano, such use of peremptory challenges is prohibited by *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and "is an error of state and federal constitutional magnitude requiring reversal

per se." As explained below, we conclude the record contains substantial evidence to support the trial court's *Batson*/*Wheeler* rulings challenged on appeal.

1. *Additional Background*

During jury selection, Manzano's counsel made a *Batson*/*Wheeler* motion after the prosecutor used a peremptory challenge to exclude a third Hispanic man from the jury. The trial court found no prima facie case of discriminatory purpose and denied the motion. Manzano's counsel made another *Batson*/*Wheeler* motion when the prosecutor used a peremptory challenge against a fourth Hispanic man. This time, the court found a prima facie case of discriminatory purpose and asked the prosecutor for an explanation. After hearing from the prosecutor and Manzano's counsel, the court denied the motion.

After the jury was selected, the trial court asked the prosecutor to explain his use of peremptory challenges against the two Hispanic men he excused before Manzano's counsel made the first *Batson*/*Wheeler* motion. These challenges, which are the only ones at issue on appeal, were made to prospective jurors A.A. (No. 67) and R.O. (No. 172).

The prosecutor began his explanation by stating the juror questionnaires did not have any "racial information. That's been whited out by another person in my office."

The prosecutor then explained he excused R.O. for several reasons: (1) R.O. was "extremely confused about the death penalty" even after voir dire; (2) "[h]e was not engaged in the questioning by counsel or by the court unlike the other jurors"; (3) R.O. had "low education levels" and no "outside activities"; (4) he had "no experience . . . working in a group-like situation to develop an ultimate decision or to

reach an ultimate goal"; and (5) "[h]e would be very reluctant to impose the death penalty."

As to the peremptory challenge to A.A., the prosecutor again gave several reasons for the challenge: (1) A.A. "was extremely confused by the process" as "shown in his questionnaire," but the confusion was not cleared up by oral voir dire; (2) "he had a bad experience with police officers, to wit, a CHP [California Highway Patrol] officer had lied about a ticket"; (3) A.A.'s "coworker had sent threatening text messages," and A.A. "had been beat up in a nightclub"; (4) "[h]e was very opinionated," stating "he felt the process produced too many innocent people being victimized by the system," he "'[would] believe what [he] believe[d],'" and "he would accept no excuses in terms of background"; (5) A.A. "was pro death, . . . almost a fanatic on it"; and (6) after he entered the jury box, A.A. "began to slouch in the seat [and] tak[e] no interest in [the proceedings]," indicating to the prosecutor that A.A. would not "fit cohesively with the remainder of the jurors."

After hearing from Manzano's counsel, who disagreed that A.A. slouched in his seat and appeared "disrespectful" but did not otherwise challenge the factual assertions of the prosecutor, the trial court found the prosecutor had articulated valid reasons for excusing R.O. and A.A. The court also noted that after the jury had been selected, the prosecutor had 10 remaining peremptory challenges and two Hispanic men had been selected for the jury.

2. *General Legal Principles*

It is settled that using peremptory challenges to excuse prospective jurors on the basis of race violates a criminal defendant's federal constitutional right to equal protection of the laws (U.S. Const., 14th Amend.; *Batson*, *supra*, 476 U.S. at p. 89) and state constitutional right to a jury drawn from a representative cross-section of the community (Cal. Const., art. I, § 16; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277). Such use is also prohibited by statute. (Code Civ. Proc., § 231.5.)

When ruling on a defendant's *Batson*/*Wheeler* motion objecting to the prosecutor's use of peremptory challenges, the trial court follows a three-step procedure. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the [prosecutor] to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'" (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted.)

"On appeal, when reviewing a trial court's third-step determination on the ultimate issue of purposeful discrimination, we apply the deferential substantial evidence standard." (*People v. Elliott* (2012) 53 Cal.4th 535, 559 (*Elliott*).) The pertinent record includes the transcript of the oral voir dire and any juror questionnaires. (*People v. Griffin* (2004) 33 Cal.4th 536, 555.) In reviewing those materials, we presume the prosecutor used peremptory challenges in a constitutional manner, and give great

deference to the trial court in distinguishing bona fide reasons from pretextual excuses. (*People v. Booker* (2011) 51 Cal.4th 141, 165.) As long as the trial court made a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered by the prosecutor, the court's conclusions are entitled to deference on appeal. (*Ibid.*)

3. *Analysis of Manzano's Claims*

As an initial matter, Manzano advances a procedural argument: "the trial court committed error by failing to conduct the 'step three' analysis" under *Batson*/*Wheeler* "to determine the credibility of the prosecutor's explanation." According to Manzano, because the prosecutor provided "unsupported reasons for excusing prospective Hispanic jurors" R.O. and A.A., "'more [was] required of the trial court than a global finding that the reasons appear sufficient.'" (Quoting *People v. Silva* (2001) 25 Cal.4th 345, 386, emphasis added by appellant omitted.) We disagree.

Our Supreme Court rejected an argument indistinguishable from Manzano's in *People v. Lewis* (2008) 43 Cal.4th 415 (*Lewis*). In *Lewis*, "[t]he trial court denied the motions only after observing the relevant voir dire and listening to the prosecutor's reasons supporting each strike and to any defense argument supporting the motions. Nothing in the record suggests that the trial court either was unaware of its duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty. [Citations.] Moreover, the trial court was not required to question the prosecutor or explain its findings on the record because, as we will explain, the prosecutor's reasons were neither inherently implausible nor unsupported by the record." (*Id.* at p. 471.) Under these circumstances, which exist in this case to the same extent they did in *Lewis*,

the Supreme Court held that appellate courts "apply the usual substantial evidence standard" in reviewing the trial court's rulings on objections to peremptory challenges. (*Ibid.*; accord *People v. Jones* (2011) 51 Cal.4th 346, 361 (*Jones*).) We thus proceed to apply that standard of review to the trial court's rulings on Manzano's objections to the prosecutor's peremptory challenges of R.O. and A.A.

As noted, the prosecutor gave several reasons for excusing R.O., including lack of education; lack of "outside activities"; lack of decisionmaking experience; confusion and inconsistency about the death penalty even after voir dire; reluctance to impose the death penalty; and lack of engagement during voir dire. Our Supreme Court has held such reasons are permissible, race-neutral grounds for using a peremptory challenge to excuse a prospective juror. (See, e.g., *Elliott*, *supra*, 53 Cal.4th at pp. 561, 566 [reluctance to return death verdict; inconsistency and ambiguity of questionnaire and oral voir dire responses]; *People v. Ledesma* (2006) 39 Cal.4th 641, 678-679 [concern prospective juror "was not very bright" and gave inconsistent answers on questionnaire and oral voir dire]; *People v. Reynoso* (2003) 31 Cal.4th 903, 924, 925 (*Reynoso*) [juror had "insufficient 'educational experience,'" no prior experience with jury or criminal justice system, and "appeared to be inattentive and uninvolved in the jury selection process"]; *People v. Sims* (1993) 5 Cal.4th 405, 431 [prospective jurors' "inexperience with assuming weighty decisions and responsibilities"].) As discussed below, substantial evidence supports these stated reasons.

R.O. indicated on his juror questionnaire that his highest educational level was high school. Although he indicated he had "work[ed] with a group of people to make a

decision" in a work-related context, R.O. also indicated he belonged to no clubs, civic organizations, or volunteer groups; seldom pursued positions of leadership; and had no previous experience with the jury or criminal justice system.[3] With respect to death penalty issues, R.O.'s questionnaire answers indicated an unwillingness to consider most of the aggravating and mitigating factors relevant to penalty determination and an inclination to impose an LWOP prison term ("very strong") rather than death ("[i]f deserved"). Other answers contained spelling or grammatical errors, or were nonresponsive, simplistic or inconsistent. Because the prosecutor reasonably could conclude from these answers that R.O. "would not be the best type of juror for the case"

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[3] The California Supreme Court has held that a prospective juror's questionnaire responses, such as R.O.'s, indicating "no prior jury experience and no prior contact with the criminal justice system in any capacity" supported a prosecutor's "demeanor-based reason" for excusing the prospective juror on the ground "that it appeared to him she was not paying attention to the proceedings, and that he felt she was not sufficiently involved in the jury selection process to make a good juror." (*Reynoso*, *supra*, 31 Cal.4th at pp. 925, 926.) The Supreme Court further held that "[s]ince the trial court was in the best position to observe the prospective jurors' demeanor and the manner in which the prosecutor exercised his peremptory challenges, the implied finding, that the prosecutor's reasons for excusing [the prospective juror], including the demeanor-based reason, were sincere and genuine, is entitled to 'great deference' on appeal." (*Id.* at p. 926.)

Here, aside from the prosecutor's statement regarding R.O.'s lack of engagement in the jury selection process, the record contains no specific information bearing directly on this issue. Under *Reynoso*, *supra*, 31 Cal.4th 903, 925, however, R.O.'s questionnaire responses support the prosecutor's statement. Further, although Manzano's appellate counsel points to portions of the oral voir dire transcript where R.O. answered questions from Manzano's trial counsel and the court, and argues from those portions that R.O. was engaged in the jury selection process, Manzano's trial counsel, who was able to observe R.O. during the process, did not dispute the prosecutor's statement that R.O. was not engaged. Under these circumstances, we deem it appropriate to defer to the trial court's implicit finding that the prosecutor's stated reason for excusing R.O. was "sincere and genuine." (*Id.* at p. 926.)

(*Reynoso*, *supra*, 31 Cal.4th at p. 925), the record contains substantial evidence that supports the prosecutor's stated grounds for excusing R.O. and justifies the trial court's denial of Manzano's *Batson*/*Wheeler* motion (see *Elliott*, *supra*, 53 Cal.4th at p. 561 [prospective juror's questionnaire answers provided substantial evidence to support trial court's denial of *Batson*/*Wheeler* motion]).[4]

Manzano contends the prosecutor's stated reasons for excusing R.O. were a mere pretext, and the real reason was R.O.'s race. For example, in disputing the prosecutor's assertions that R.O. was confused about and would be reluctant to impose the death penalty, Manzano complains "the questionnaire dealt with the death penalty in a confusing way"; and he points out that after the court explained certain aspects of the penalty phase procedure during oral voir dire, R.O. stated he could vote for a death verdict if "substantial aggravating factors . . . convinced [him] death was appropriate." Manzano, however, forfeited any claim the juror questionnaire was so confusing that questionnaire answers cannot provide an adequate basis for the prosecutor's peremptory challenge of R.O., because the record indicates Manzano's trial counsel was heavily involved in drafting the questionnaire and accepted, without apparent objection, the final form of the questionnaire. (*People v. Thompson* (2010) 49 Cal.4th 79, 97 (*Thompson*).) As noted above, R.O.'s questionnaire answers support the prosecutor's stated concern

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4 Substantial evidence need not, however, support *every* race-neutral reason articulated by a party for excusing a prospective juror. Where, as here, a party states several reasons for excusing a prospective juror, each reason that is supported by substantial evidence may *alone* justify the peremptory challenge. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124 (*Gutierrez*).)

about R.O.'s confusion, and our Supreme Court repeatedly has held that juror questionnaire answers may constitute substantial evidence in support of a trial court's denial of a defendant's *Batson*/*Wheeler* motion. (E.g., *Elliott*, *supra*, 53 Cal.4th at p. 561; *People v. Hamilton* (2009) 45 Cal.4th 863, 902 (*Hamilton*); *People v. Jurado* (2006) 38 Cal.4th 72, 106.) Those answers do not lose their status as substantial evidence in support of the trial court's ruling merely because R.O. gave other answers during oral voir dire suggesting his confusion had been cleared up. Although R.O. eventually "stated [he] could impose the death penalty, 'neither the prosecutor nor the trial court was required to take [his] answers at face value'" (*People v. Panah* (2005) 35 Cal.4th 395, 441); and "the mere possibility that one could draw plausible inferences about [R.O.] other than those the prosecutor did does not mean the prosecutor's stated reason was pretextual" (*Thompson*, at p. 108).

As additional support for his argument the prosecutor's stated grounds for excusing R.O. were pretextual, Manzano cites questionnaire and oral voir dire responses from other prospective jurors who were also confused about death penalty issues or had no formal education beyond high school, but whom the prosecutor did not immediately challenge. Manzano concedes, however, that "all of the jurors accepted to the panel had at least 'some college' education," and that his trial counsel and the prosecutor each ultimately exercised peremptory challenges against the two other prospective jurors who had no formal education beyond high school. (See *Wheeler*, *supra*, 22 Cal.3d at p. 282 [prosecutor may justify challenge by demonstrating "that in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or

comparable grounds"].) And as the People correctly point out, although the responses of two prospective jurors who subsequently sat on the panel indicated some confusion regarding death penalty questions, compared to R.O. those jurors appeared less confused, had more education, had sat on a jury previously, and expressed no similar reluctance to impose the death penalty. Because those other jurors were thus more favorable to the prosecutor in other respects he considered important, his decision not to challenge them on the ground of confusion about the death penalty does not indicate pretextual reliance on that ground as one of several for excusing R.O. (See *Jones*, *supra*, 51 Cal.4th at p. 365 ["A party concerned about one factor need not challenge every prospective juror to whom that concern applies in order to legitimately challenge any of them."]; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 678 ["'[A] party may decide to excuse a prospective juror for a variety of reasons, finding no single characteristic dispositive.'"].)[5]

Manzano also asserts the prosecutor's failure to ask R.O. any questions when the court permitted counsel to conduct personal voir dire examination "shows the prosecutor's stated reason for challenging [R.O.] was not sincere." We disagree. The

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5 The California Supreme Court has recognized the "inherent limitations" of the type of comparative juror analysis employed by Manzano here. (*People v. Lenix* (2008) 44 Cal.4th 602, 624 (*Lenix*).) In particular, the Supreme Court has cautioned against concluding, as Manzano does, that jurors were similarly situated because they answered a given question the same way. "Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*Ibid.*) In short, "[a]dvocates do not evaluate panelists based on a single answer. Likewise, reviewing courts should not do so." (*Id.* at p. 631.)

failure to question a prospective juror "is of limited significance in a case such as this one, in which the prosecutor reviewed the jurors' questionnaire answers and was able to observe their responses and demeanor, first, during extensive individual questioning by the court and later, during group voir dire." (*People v. Clark* (2011) 52 Cal.4th 856, 906-907 (*Clark*).) And in any event, "a party need not inquire into every possible concern that party may have regarding a prospective juror." (*Jones*, *supra*, 51 Cal.4th at p. 368.) Here, "the prosecutor reasonably could have believed that voir dire would do nothing to clarify [R.O.'s] questionnaire responses" about his education level and reluctance to impose the death penalty, "which were unambiguous and themselves sufficient to support the exercise of a peremptory challenge." (*Lewis*, *supra*, 43 Cal.4th at p. 477.)

Turning to the prosecutor's peremptory challenge of prospective juror A.A., we note the prosecutor again gave several reasons for the challenge, including A.A.'s confusion about death penalty issues; "bad experience with police officers" regarding a traffic ticket; unstable lifestyle, including receipt of threats from a coworker and involvement in a violent incident at a nightclub; opinions that "too many innocent people [were] victimized by the system"; insistence he "'[would] believe what [he] believe[d]'" and "would accept no excuses in terms of background"; and being "almost a fanatic" on the death penalty.[6] The California Supreme Court has held that permissible, race-neutral

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6 As noted, another reason the prosecutor gave for excusing A.A. was that after he entered the jury box, A.A. "began to slouch in the seat, taking no interest in [the proceedings]." A party may rely on a prospective juror's demeanor as a basis for a peremptory challenge. (E.g., *Elliott*, *supra*, 53 Cal.4th at p. 569.) Because, however, (1) the prosecutor stated several other race-neutral reasons for excusing A.A.,

grounds for a peremptory challenge include a prospective juror's: (1) ambiguous and inconsistent answers during voir dire (*Elliott*, *supra*, 53 Cal.4th at p. 566); (2) "negative experience with law enforcement" (*People v. Turner* (1994) 8 Cal.4th 137, 171); (3) involvement in alcohol-related violent incidents (*People v. Salcido* (2008) 44 Cal.4th 93, 140 (*Salcido*)) or other characteristics that "suggest an unconventional lifestyle" (*Wheeler*, *supra*, 22 Cal.3d at p. 275); (4) "distrust of the criminal justice system" (*Clark*, *supra*, 52 Cal.4th at p. 907); (5) strong opinions about the death penalty (*People v. Avila* (2006) 38 Cal.4th 491, 558); and (6) unwillingness "'to be open-minded'" (*Elliott*, at p. 569) or to "be influenced by anyone's opinion but his own" (*Gutierrez, supra*, 28 Cal.4th at p. 1125). The record of the jury selection process contains evidence to support each of these grounds for excusing A.A.

Manzano concedes "[s]everal of [A.A.'s] responses to the questionnaire did indicate some confusion regarding the process" of selecting between death and an LWOP prison term at the penalty phase. He also concedes A.A.'s questionnaire responses regarding death penalty issues were contradictory and inconsistent with answers he later gave during oral voir dire.

Additionally, A.A.'s questionnaire responses indicated he had negative opinions about law enforcement and the criminal justice system. For example, in response to the

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(2) Manzano's trial counsel disputed the prosecutor's assessment of A.A.'s demeanor, (3) the trial court made no express finding regarding A.A.'s demeanor, and (4) the "cold appellate record has inherent limitations" that prevent us from evaluating demeanor (*Lenix*, *supra*, 44 Cal.4th at p. 622), we need not and do not decide whether A.A.'s demeanor supports the trial court's denial of Manzano's *Batson*/*Wheeler* motion.

question whether he had any bad experiences with law enforcement, A.A. wrote: "The CHP officer that gave me a ticket. I felt he lied in court. I felt that although I was speeding, he lied on the speed of the ticket." In response to questions about the role of the criminal justice system and the death penalty, A.A. wrote that "in too many cases, innocent people have gone to jail for something they didn't do," and that "innocent people have gone to jail for serious crimes like this."

A.A.'s questionnaire responses also substantiated the prosecutor's stated concern that A.A. "[s]eem[ed] like . . . a person who's living on the edge." When asked whether he had ever filed a police report, A.A. responded "yes," and explained that "[a] coworker was sending threatening text messages." When asked whether he had ever been physically attacked, A.A. responded "yes," and explained that he "was beat up by a group of men inside a nightclub."

Finally, several of A.A.'s questionnaire responses indicated he was a man of strong opinions about the death penalty and other matters who was unlikely to listen to or be persuaded by fellow jurors. For example, A.A. wrote childhood and stressful life experiences were "a lame excuse" for a person's wrongdoing; indicated he would not consider the majority of the aggravating and mitigating factors relevant to selecting between death or an LWOP prison term; and wrote that "we do not give [the death penalty] enough for crimes that are deserving," and "far too often . . . people get life in prison when they should've received the death penalty." Further, when asked, "What is

your opinion about your ability to hold firm to your decision even if all the other jurors disagree with you?" A.A. wrote, "I don't care. I will believe what I believe."[7]

In sum, A.A.'s questionnaire responses provided substantial evidence to support the prosecutor's stated reasons for excusing him. The trial court's denial of Manzano's *Batson*/*Wheeler* motion challenging that excusal was therefore proper. (See, e.g., *Elliott, supra,* 53 Cal.4th at p. 561 [prospective juror's questionnaire answers provided substantial evidence to support trial court's denial of *Batson*/*Wheeler* motion].)

As he argued with respect to the excusal of R.O., Manzano argues the prosecutor's stated reasons for excusing A.A. were mere pretexts intended to disguise racial discrimination. Manzano initially complains that "many of the prospective jurors found the penalty phase section of the questionnaire confusing" and asserts that A.A. "was no different." As we previously explained, however, Manzano forfeited any claim the questionnaire was so confusing that a prospective juror's responses cannot form the basis for a peremptory challenge. (*Thompson*, *supra*, 49 Cal.4th at p. 97.) Thus, A.A.'s concededly contradictory and inconsistent answers regarding the death penalty were

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7 Manzano's trial counsel pursued this topic further during oral voir dire. Counsel asked A.A.: "And suppose that you're in the jury room and you're sitting there, and you're being opposed by [all the other jurors]. Where are you going to stand in terms of your opinion?" A.A. responded: "I'm going to stick to my guns. And if that's the way I feel, that's the way I feel. I'm not going to change my mind just to make everybody happy." This exchange bolsters the prosecutor's concern that A.A. "might be inclined to be a sole holdout," which is a permissible, race-neutral reason for a peremptory challenge. (*People v. Perez* (1994) 29 Cal.App.4th 1313, 1330.)

themselves sufficient to justify the prosecutor's excusal of A.A. (*Elliott*, *supra*, 53 Cal.4th at p. 566; *Salcido*, *supra*, 44 Cal.4th at p. 141.)

As further support for his pretext argument, Manzano parses A.A.'s written juror questionnaire and oral voir dire examination to cite responses that undermine or contradict the prosecutor's assessment of A.A. as a potential juror. We need not respond point by point to Manzano's alternative assessment of A.A., however, because "the question is not whether a different advocate would have assessed the risk [posed by A.A. as a juror] differently, but whether [the prosecutor] was acting in a constitutionally prohibited way." (*Lenix*, *supra*, 44 Cal.4th at p. 629.) Because "[t]he proper focus of a *Batson*/*Wheeler* inquiry . . . is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons . . ." (*Reynoso*, *supra*, 31 Cal.4th at p. 924; accord, *Hamilton*, *supra*, 45 Cal.4th at p. 903), "[t]he plausibility of [the prosecutor's stated] reasons will be reviewed, but not reweighed, in light of the entire record" (*Lenix*, at p. 621). Where, as here, the evidence supports the trial court's conclusion that the prosecutor's stated reasons for peremptorily challenging a prospective juror were race-neutral and not pretextual, the opinion of the reviewing court that the evidence might also support a contrary conclusion does not warrant reversal. (*Id.* at pp. 627-628.)

In addition to the grounds articulated by the prosecutor for excusing R.O. and A.A., the trial court relied on the fact that two Hispanic men had been accepted onto the jury as another factor supporting denial of Manzano's *Batson*/*Wheeler* motions. The parties do not contest the trial court's reliance on this additional factor. "'While the fact

that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a [*Batson*/]*Wheeler* objection.'" (*People v. Ward* (2005) 36 Cal.4th 186, 203; accord, *Clark*, *supra*, 52 Cal.4th at p. 906; *Lewis*, *supra*, 43 Cal.4th at p. 480.)

"In sum, 'a prosecutor, like any party, may exercise a peremptory challenge against anyone, including members of cognizable groups. All that is prohibited is challenging a person *because* the person is a member of that group.'" (*Jones*, *supra*, 51 Cal.4th at p. 369.) The record here shows the prosecutor exercised his peremptory challenges for legitimate, race-neutral reasons, not to eliminate Hispanic men because of their race. Accordingly, "[t]his case presents no exceptional circumstances requiring us to overturn the trial court's ruling[s]." (*Ibid.*)

B. *Manzano Has Not Established His Trial Counsel Provided Ineffective Assistance*

Manzano claims he was denied his constitutional right to the effective assistance of counsel because his trial counsel did not take adequate steps to correct the prosecutor's false statement during the guilt phase closing argument that Holguin's DNA was found in a blood stain on Manzano's pants. After setting forth additional relevant background information, we shall explain why we reject this claim of error.

1. *Additional Background*

At the guilt phase of Manzano's trial, a supervising criminalist who worked for the sheriff's department testified regarding the results of DNA tests she had performed on several articles of clothing Manzano wore the night of the murders, including his pants.

According to the criminalist, several blood stains on the pants contained a mixture of DNA from Manzano and another donor; but Holguin, Holguin's son and Gurule were all excluded as possible donors of the DNA found in any of those stains.

During the initial portion of his closing argument at the guilt phase, the prosecutor made no mention of the DNA test results.

Manzano's trial counsel, however, briefly mentioned the DNA evidence in his closing argument. He argued the prosecutor "minimize[d]" that evidence because the prosecutor knew "there's no DNA in this case" and "want[ed the jury] to think, 'Well, DNA is not important.'" Counsel further pointed out to the jury that there was "[n]o blood, no DNA, [and] no fingerprints" linking Manzano to the murders.

During the rebuttal portion of his closing argument, the prosecutor disagreed with Manzano's trial counsel and told the jury Holguin's DNA had been found on Manzano's pants:

> "[The prosecutor]: DNA. All right, the DNA in this case is -- is relatively weak. The reason for that is, well, you heard the testimony. DNA is sometimes the be-all to tell all. You received figures in the quadrillions. You had that in this case. But you had identity evidence that you would expect to have that type of strong DNA. Clothing belonging to Mr. Manzano had his blood on it. Also, that blue shirt that he denied being his, had his blood on it. And the DNA showed it. [¶] But you do have some DNA that relates back to one of the victims. And, it is not strong, but it does have some evidentiary weight. *You have the DNA of* [*Holguin*] *on the pants.*
>
> "[Defense counsel]: Objection. Misstates the evidence.
>
> "The Court: The pants or shoes?
>
> "[The prosecutor]: Pants.
>
> "[Defense counsel]: That wasn't the testimony.

"The Court: Overruled. Again, ladies and gentlemen, you are the judge of what the actual evidence and facts were. You may proceed.

"[The prosecutor]: Thank you. *And that evidence is that the blood that was found on that article of clothing, which I believe are the pants, okay, matches* [*Holguin's*] *blood type,* which he shares with one out of 97 Hispanics. So, approximately a 1 percent match. Now, ladies and gentlemen, that may seem very high mathematically, but in terms of DNA, it's very low. It's very low. . . . [¶] Also, it could match a Caucasian. One out of 11, approximately 10 percent of Caucasians share that DNA blood type that was found on that article of clothing. [¶] Again, some evidence, but not telling. And you certainly could not issue a case, a criminal case which requires proof beyond a reasonable doubt, based upon that evidence alone. [¶] In combination with everything else? Perhaps now you have proof beyond a reasonable doubt. Perhaps." (Italics added.)

The People concede the prosecutor misstated the evidence when he told the jury that Holguin's DNA had been found on the pants Manzano wore the night of the murders. Indeed, as noted above, the criminalist who performed the DNA analysis testified Holguin had been *excluded* as a contributor to the blood stains found on Manzano's pants.[8]

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8 As Manzano's appellate counsel postulates, a punctuation placement error in the reporter's transcript of the criminalist's testimony, which was prepared before closing arguments (see § 190.9, subd. (a)(1) [requiring daily transcript of proceedings in capital case]), may have led to the prosecutor's misstatement. According to the transcript, when the prosecutor asked the criminalist what she found in a particular cutting, she answered: "The presence of human blood was indicated for item D-1M. The results for this sample indicate a mixture of at least two individuals. *Assuming the presence of a total of two individuals, the major profile matches Mathew Manzano and Raymond Holguin, Jr. Raymond Holguin III and Fernando Gurule are excluded as possible donors of the major profile.*" (Italics added.) Although as reported this portion of the transcript states *both* Manzano's *and* Holguin's DNA were found on Manzano's pants, the immediately subsequent exchange between the prosecutor and the criminalist makes clear the criminalist had actually testified, and at the time the prosecutor understood her testimony to be, that she had *excluded* Holguin, his infant son and Gurule as possible donors. Thus, when the entirety of the criminalist's testimony on this topic is read, it appears the italicized sentences quoted above should have been punctuated to read: "Assuming the

2. *Legal Analysis*

Manzano claims he was deprived of his federal and state constitutional rights to the effective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)[9] To prevail on these claims, he must show that (1) trial counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability the result of the trial would have been different had counsel's errors not occurred. (*Strickland*, at pp. 687-688, 694; *People v. Ledesma*, *supra*, at pp. 216-217.) Manzano contends it is reasonably probable he would have obtained a better outcome at trial had his trial counsel done more than merely object that the prosecutor had misstated the evidence when he told the jury during closing argument that Holguin's DNA had been found in blood stains on Manzano's pants. He contends counsel *also* should have (1) "immediately requested that the court correct the error" *and* (2) specifically "object[ed] that the prosecutor's tactics and

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presence of a total of two individuals, the major profile matches Mathew Manzano. And Raymond Holguin, Jr., Raymond Holguin III and Fernando Gurule are excluded as possible donors of the major profile." Indeed, in a declaration submitted in support of Holguin's petition for writ of habeas corpus, the criminalist confirmed this latter punctuation, and not the one actually contained in the reporter's transcript, is the correct one.

9 The federal Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." (U.S. Const., 6th Amend.; see *Gideon v. Wainwright* (1963) 372 U.S. 335, 342-343 [holding 6th Amend. right to counsel applies in state court criminal trials].) The state Constitution similarly provides: "The defendant in a criminal cause has the right . . . to have the assistance of counsel for the defendant's defense . . . ." (Cal. Const., art. I, § 15.)

argument amounted to misconduct," and his failure to do so "undermined confidence in the verdicts." We are not persuaded.

Preliminarily, we note that as part of his ineffective assistance claims, Manzano argues that the prosecutor committed misconduct when he misstated the DNA evidence and that such misconduct *by itself* requires reversal of the judgment. Specifically, he accuses the prosecutor of "playing 'hide the ball' in dealing with the Holguin DNA evidence" when he "saved his bombshell for rebuttal," and argues such "deception" "made [his] trial fundamentally unfair." According to Manzano: "Had the prosecutor dropped his DNA bombshell during his initial jury summation, rather than withholding it until rebuttal, trial counsel's summation clearly would have been far different. He would have had an opportunity to address the prosecutor's assertion in detail. The prosecutor denied [trial counsel] that opportunity by waiting until rebuttal. In that way the prosecutor had the last word on this topic."

We agree with Manzano that a prosecutor commits misconduct where, as here, he misstates or mischaracterizes the evidence or asserts facts that are not in evidence. (*People v. Davis* (2005) 36 Cal.4th 510, 550; *People v. Hill* (1998) 17 Cal.4th 800, 823, 827-828 (*Hill*).) But, "[t]o preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument." (*People v. Gonzales* (2011) 52 Cal.4th 254, 305.) Manzano did not object to the prosecutor's misstatement as misconduct at trial or ask the trial court to admonish the jury to disregard the misconduct. He thereby forfeited the prosecutorial misconduct claim because an admonition could have cured any

potential harm caused by the misconduct. (E.g., *People v. Fuiava* (2012) 53 Cal.4th 622, 679-680; *People v. Benson* (1990) 52 Cal.3d 754, 794.) We therefore need not consider any claim of prosecutorial misconduct,[10] and instead turn to the alleged deficiencies in the performance of Manzano's trial counsel.

In considering those alleged deficiencies, we note that the California Supreme Court repeatedly has held a trial attorney's decision whether to object or seek a jury admonition is a strategic one, and the failure to do either seldom establishes constitutionally ineffective assistance of counsel. (E.g., *People v. Castaneda* (2011) 51 Cal.4th 1292, 1335 (*Castaneda*); *People v. Collins* (2010) 49 Cal.4th 175, 233 (*Collins*); *People v. Ghent* (1987) 43 Cal.3d 739, 772-773 (*Ghent*).) The Supreme Court has "noted on countless occasions [that] the decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one," and it has expressed reluctance "to second-guess defense counsel's apparent

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10 We nonetheless note that to obtain reversal of his convictions on the basis of prosecutorial misconduct, Manzano would have to show that the misconduct deprived him of a fundamentally fair trial or that it is reasonably probable he would have obtained more favorable verdicts had the misconduct not occurred. (E.g., *People v. Martinez* (2010) 47 Cal.4th 911, 955; *People v. Crew* (2003) 31 Cal.4th 822, 839.) As discussed later in the text, the trial court repeatedly instructed the jury that the attorneys' statements in closing arguments were not evidence, both the prosecutor and Manzano's trial counsel minimized the importance of the DNA evidence, and the other evidence against Manzano was compelling. Under these circumstances, the prosecutor's misstatement that Holguin's DNA was found in a blood stain on Manzano's pants did not deprive him of a fundamentally fair trial. Nor is it reasonably likely Manzano would have obtained more favorable verdicts had the prosecutor either (1) not misstated the evidence at all; or (2) "dropped his DNA bombshell during his initial jury summation, rather than withholding it until rebuttal," so that Manzano's trial counsel could have responded in detail.

decision not to object." (*People v. Padilla* (1995) 11 Cal.4th 891, 942, overruled on other grounds by *Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1.) "Moreover, '[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 206 (*Huggins*).)

Here, the record on appeal contains no information about why Manzano's trial counsel did not do anything more than object that the prosecutor misstated the evidence by telling the jury Holguin's DNA had been found on Manzano's pants. And, contrary to Manzano's assertion, this is not a situation in which counsel could have had no tactical reason for not doing more. For example, counsel could have concluded further steps on his part would have drawn closer attention to the prosecutor's misstatement, which might have caused more harm than the misstatement and objection. (See *Castaneda*, *supra*, 51 Cal.4th at p. 1335; *Collins*, *supra*, 49 Cal.4th at p. 233; *Ghent*, *supra*, 43 Cal.3d at p. 773.) Or, counsel could have concluded his objection, coupled with the trial court's reminder to the jury that it was its duty to determine the facts, was equivalent to an admonition that was sufficient to correct the prosecutor's factual misstatement. (Cf. *People v. Kipp* (2001) 26 Cal.4th 1100, 1130 [after objection that prosecutor was appealing to jurors' sympathy and court's statement that jury would receive an instruction not to be guided by sympathy, counsel could "have concluded that the instruction would function as an admonition"].) Thus, because there are possible reasonable explanations for Manzano's trial counsel's not taking additional steps to address the prosecutor's factual

misstatement, "[w]e cannot find on this record that counsel's performance was deficient." (*Huggins*, *supra*, 38 Cal.4th at p. 206.)[11]

Even if we assume Manzano's trial counsel erred by not taking additional corrective action after objecting to the prosecutor's misstatement, we would still reject Manzano's ineffective assistance claims. As noted earlier, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." (*Strickland*, *supra*, 466 U.S. at p. 692; accord, *People v. Ledesma*, *supra*, 43 Cal.3d at p. 217.) In particular, where, as here, "a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (*Strickland*, at p. 695; accord, *People v. Ledesma*, *supra*, at p. 218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

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11 Where, as here, the record on appeal contains no explanation for defense counsel's failure to object or request an admonition, the issue is "cognizable only on habeas corpus as part of a claim of ineffective assistance of counsel." (*People v. Carrera* (1989) 49 Cal.3d 291, 320.) Manzano filed a companion petition for writ of habeas corpus asserting the exact same ineffective assistance claims urged on appeal, but again provided no explanation for the conduct of trial counsel of which he complains. In a declaration submitted with the petition, Manzano's appellate counsel stated he spoke to trial counsel about his handling of the prosecutor's misstatement and drafted a declaration for trial counsel to sign. According to Manzano's appellate counsel, although trial counsel "basically agreed with the content of the proposed declaration," he refused to sign it; and appellate counsel concluded it would not be "appropriate" to tell us the content of the declaration. The petition for writ of habeas corpus therefore does not provide any facts from which we could conclude Manzano's trial counsel's performance was deficient, a conclusion we would need to reach before we could grant relief. (See *Strickland*, *supra*, 466 U.S. at p. 687; *People v. Ledesma*, *supra*, 43 Cal.3d at p. 216.)

(*Strickland*, at p. 694; accord, *People v. Ledesma*, *supra*, at p. 218.) There is no such probability here.

It is not reasonably likely the jury was misled by the prosecutor's factual misstatement regarding the presence of Holguin's DNA on Manzano's pants. Before that misstatement was made, the trial court had instructed the jury: "You must decide what the facts are in this case. . . . [¶] Nothing the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence." The court reminded the jury, immediately before closing arguments, that "the statements of the attorneys are not evidence, cannot be considered by you as evidence." And, in response to Manzano's trial counsel's objection to the prosecutor's misstatement, the court again advised the jurors that they "are the judge of what the actual evidence and facts were." "We presume the jury followed these instructions." (*People v. Avila* (2009) 46 Cal.4th 680, 719.)

Furthermore, the DNA test results were not a significant component of the evidence establishing Manzano's guilt. Indeed, during jury selection the prosecutor stated the DNA evidence would "indicate nothing" and would not be "conclusive" in this case. Even in the rebuttal portion of the guilt phase closing argument about which Manzano complains, the prosecutor spent very little time on the DNA evidence. He described that evidence as "relatively weak," "not strong," "very low" in strength and "not telling"; argued the jury "certainly could not" return a guilty verdict "based upon that evidence alone"; and suggested that "[p]erhaps," [i]n combination with everything else," there was enough to establish Manzano's guilt beyond a reasonable doubt. The prosecutor thus

expressed uncertainty about and placed very little reliance on the DNA evidence as proof that Manzano murdered Holguin. In stark contrast, Manzano's trial counsel expressed no such uncertainty; he frankly told the jury there was "[n]o blood, no DNA, [and] no fingerprints" linking Manzano to the murders.

Rather, this case turned on the testimony of Regalado, to whom Manzano confessed the murders while they were in prison together. As related above, Regalado gave a credible account of the murders that placed Manzano at the murder scene, identified him as the killer, explained his motive, and included many details about the killings and how Estrada shot Manzano during the killings. (See pt. I.C., *ante*.) Other witnesses' testimony and physical evidence corroborated Regalado's testimony. (See pt. I.A.-B., *ante*.) For example: (1) footprints matching the shoes Manzano wore the night of the murders were found at the murder scene; (2) after the shootings, Holguin's girlfriend heard the shooter make a remark ("What's up now, fool?") that indicated fulfillment of Manzano's earlier promise to Estrada ("I'll run up in that fool's house" and "show you what's up"); (3) a bullet fired from the same gun that fired some of the bullets found at the murder scene was removed from Manzano's pelvis shortly after a neighbor saw a man limp out of Holguin's house and heard him say he thought he had been stabbed; and (4) a detective investigated but found no evidence to substantiate Manzano's claim he was shot by unknown assailants miles away from the murder scene, a claim Regalado testified Manzano had fabricated. All of this evidence tended to establish Manzano's guilt and to negate his asserted alibi.

In light of Regalado's testimony, the other non-DNA evidence incriminating Manzano and corroborating Regalado's testimony, and the minimization of the DNA evidence by both the prosecutor and Manzano's trial counsel, we reject the speculative assertion of Manzano's appellate counsel at oral argument that because the case against Manzano was weak, the prosecutor deliberately misrepresented the DNA evidence in an attempt to bolster the case. On this record, we cannot conclude that if Manzano's trial counsel had complained of misconduct and requested curative admonitions when the prosecutor falsely told the jury that Holguin's DNA had been found on Manzano's pants, "there is a reasonable probability that . . . the factfinder would have had a reasonable doubt respecting guilt." (*Strickland*, *supra*, 466 U.S. at p. 695; see *Collins*, *supra*, 49 Cal.4th at p. 234 ["passing reference" that "played a minimal role in [prosecutor's] argument" was not prejudicial]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126 [prosecutor's reference to facts not in evidence during closing argument was not prejudicial when "[o]verwhelming evidence of defendant's involvement in the instant crimes was presented through [other means]"].) Accordingly, we reject Manzano's claims of ineffective assistance of counsel.

C. *The Trial Court Did Not Err by Death Qualifying the Jury Before the Guilt Phase*

Manzano next complains the procedure the trial court employed in death qualifying the jury before the guilt phase of his trial violated his constitutional rights to an impartial jury drawn from a fair cross-section of the community. (See U.S. Const., 6th & 14th Amends.; *Taylor v. Louisiana* (1975) 419 U.S. 522, 528; Cal. Const., art. I, § 16; *People v. Bell* (1989) 49 Cal.3d 502, 525 & fn. 10.) Manzano argues the court should

have granted his motion to select two juries (one for the guilt phase and the other for the penalty phase) or to postpone voir dire about the death penalty until after the jury returned a verdict of guilty. We disagree.

Manzano acknowledges in his briefing that both the United States Supreme Court and the California Supreme Court have rejected his constitutional objections to the death qualification procedure employed by the trial court. (See *Lockhart v. McCree* (1986) 476 U.S. 162, 176-177; *People v. Taylor* (2010) 48 Cal.4th 574, 602-604; *People v. Mills* (2010) 48 Cal.4th 158, 170-173.) He also acknowledges that we are bound by those decisions. (See, e.g., *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["The decisions of this court are binding upon and must be followed by all the state courts of California."].) Accordingly, we reject Manzano's claim the trial court violated the state and federal Constitutions when it death qualified the jury before trying the guilt phase.

D. *The Sentencing Court Erred by Imposing an LWOP Prison Term for Manzano's Conviction on Count 2*

Manzano claims the sentencing court erred when it imposed an LWOP prison term for his conviction of the second degree murder of Gurule (count 2). The People agree, and so do we.

In a murder case, an LWOP prison term may be imposed only if the defendant is found guilty of *first degree murder* with special circumstances. (§§ 190, subd. (a), 190.2, subd. (a), 190.3; *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 164.) Here, however, the jury returned a verdict of *second degree murder* on count 2. With exceptions not

applicable here, the only authorized penalty for second degree murder is imprisonment for 15 years to life. (§ 190, subd. (a).) The jury's procedurally improper special circumstance findings on count 2 (see fn. 2, *ante*) did not subject Manzano to an LWOP prison term, because a conviction of "first degree murder is a prerequisite for a special circumstance finding" (*Balinton, supra,* 9 Cal.App.4th at p. 590). We therefore modify the judgment to impose a prison term of 15 years to life for Manzano's conviction on count 2. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1047-1048 & fn. 7 [modifying judgment to reduce prison sentence on second degree murder conviction from LWOP to 15 years to life].)

E. *No Cumulative Effect of Error Requires Reversal*

Finally, Manzano complains the cumulative effect of errors rendered his trial so unfair as to violate his federal constitutional right not to be deprived of "life, liberty, or property, without due process of law." (U.S. Const., 14th Amend.) Under the cumulative error doctrine, "*a series of trial errors*, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error" if together the errors "deprived [the defendant] of that which the state was constitutionally required to provide and he was entitled to receive: a fair trial." (*Hill, supra,* 17 Cal.4th at pp. 844, 847, italics added.) Here, Manzano has established *only one error*: the imposition of an unauthorized sentence for his conviction on count 2. That error, however, occurred *at sentencing* and can be fully corrected on appeal. Hence, because Manzano has *not* shown there were *multiple errors at trial*, his "claim of cumulative error is without merit." (*People v. Vieira* (2005) 35 Cal.4th 264, 305.)

This conclusion is not altered by our earlier assumption, in rejecting Manzano's ineffective assistance of counsel claims, that his trial counsel erred once by failing to correct the prosecutor's factual misrepresentations about the DNA evidence and a second time by failing to assign that misrepresentation as misconduct and request a curative admonition. (See pt. III.B.2, *ante*.) As we there explained, any such errors "were harmless, whether considered individually or collectively. [Manzano] was entitled to a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Taking all of the errors, both established and assumed, into account, we are satisfied Manzano received a fair trial and therefore deny his claim of cumulative error.

DISPOSITION

The judgment on appeal (D058661) is modified by reducing the prison term imposed on the conviction on count 2 (second degree murder of Gurule) from LWOP to 15 years to life. As so modified, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment reflecting this modification and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

The consolidated petition for writ of habeas corpus (D060795) is denied.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

HALLER, J.